

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HEATHER E.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO. 1:20-CV-3235-TOR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment (ECF Nos. 14, 23). Plaintiff is represented by D. James Tree. Defendant is represented by SAUSA Jeffrey E. Staples. This matter was submitted for consideration without oral argument. The Court has reviewed the administrative record, and is fully informed. For the reasons discussed below, the Court grants Plaintiff's motion and denies Defendant's motion.

JURISDICTION

The Court has jurisdiction pursuant to 42 U.S.C. §§ 405(g), 1383(c)(3).

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT ~ 1

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited: the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether this standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id.* An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination."

1 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
2 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
3 *Sanders*, 556 U.S. 396, 409-10 (2009).

4 **FIVE STEP SEQUENTIAL EVALUATION PROCESS**

5 A claimant must satisfy two conditions to be considered “disabled” within
6 the meaning of the Social Security Act. First, the claimant must be “unable to
7 engage in any substantial gainful activity by reason of any medically determinable
8 physical or mental impairment which can be expected to result in death or which
9 has lasted or can be expected to last for a continuous period of not less than twelve
10 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
11 impairment must be “of such severity that [he or she] is not only unable to do [his
12 or her] previous work[,] but cannot, considering [his or her] age, education, and
13 work experience, engage in any other kind of substantial gainful work which exists
14 in the national economy.” 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

15 The Commissioner has established a five-step sequential analysis to
16 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
17 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s work
18 activity. 20 C.F.R. § 416.920(a)(4)(i). If the claimant is engaged in “substantial
19 gainful activity,” the Commissioner must find that the claimant is not disabled. 20
20 C.F.R. § 416.920(b).

1 If the claimant is not engaged in substantial gainful activities, the analysis
2 proceeds to step two. At this step, the Commissioner considers the severity of the
3 claimant's impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
4 "any impairment or combination of impairments which significantly limits [his or
5 her] physical or mental ability to do basic work activities," the analysis proceeds to
6 step three. 20 C.F.R. § 416.920(c). If the claimant's impairment does not satisfy
7 this severity threshold, however, the Commissioner must find that the claimant is
8 not disabled. *Id.*

9 At step three, the Commissioner compares the claimant's impairment to
10 several impairments recognized by the Commissioner to be so severe as to
11 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §
12 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the
13 enumerated impairments, the Commissioner must find the claimant disabled and
14 award benefits. 20 C.F.R. § 416.920(d).

15 If the severity of the claimant's impairment does meet or exceed the severity
16 of the enumerated impairments, the Commissioner must pause to assess the
17 claimant's "residual functional capacity." Residual functional capacity ("RFC"),
18 defined generally as the claimant's ability to perform physical and mental work
19 activities on a sustained basis despite his or her limitations (20 C.F.R. §
20 416.945(a)(1)), is relevant to both the fourth and fifth steps of the analysis.

1 At step four, the Commissioner considers whether, in view of the claimant's
2 RFC, the claimant is capable of performing work that he or she has performed in
3 the past ("past relevant work"). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is
4 capable of performing past relevant work, the Commissioner must find that the
5 claimant is not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of
6 performing such work, the analysis proceeds to step five.

7 At step five, the Commissioner considers whether, in view of the claimant's
8 RFC, the claimant is capable of performing other work in the national economy.
9 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner
10 must also consider vocational factors such as the claimant's age, education and
11 work experience. *Id.* If the claimant is capable of adjusting to other work, the
12 Commissioner must find that the claimant is not disabled. 20 C.F.R. §
13 416.920(g)(1). If the claimant is not capable of adjusting to other work, the
14 analysis concludes with a finding that the claimant is disabled and is therefore
15 entitled to benefits. *Id.*

16 The claimant bears the burden of proof at steps one through four above.
17 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
18 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
19 capable of performing other work; and (2) such work "exists in significant
20 numbers in the national economy." 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*,

1 700 F.3d 386, 389 (9th Cir. 2012).

2 **ALJ'S FINDINGS**

3 On January 18, 2018, Plaintiff protectively filed an application for Title XVI
4 supplemental security income benefits, alleging a disability onset date of
5 December 31, 2017. Tr. 15. The application was denied initially, Tr. 115-123, and
6 on reconsideration, Tr. 124-130. Plaintiff telephonically appeared at a hearing
7 before an administrative law judge ("ALJ") on July 7, 2020. Tr. 37-60. On July
8 30, 2020, the ALJ denied Plaintiff's claim. Tr. 12-36.

9 At step one of the sequential evaluation, the ALJ found Plaintiff had not
10 engaged in substantial gainful activity since January 18, 2018, the application date.
11 Tr. 17. At step two, the ALJ found Plaintiff had the following severe impairments:
12 chronic obstructive pulmonary disease, bullous lung disease, status post
13 bullectomy, endometriosis, major depressive disorder, and posttraumatic stress
14 disorder ("PTSD"). Tr. 18. At step three, the ALJ found that Plaintiff's
15 impairments did not meet or medically equal the severity of a listed impairment.
16 Tr. 19. The ALJ then found that Plaintiff had the RFC to perform light work with
17 the following limitations:

18 She is able to lift and/or carry 20 pounds occasionally and 10 pounds
19 frequently. She can stand and/or walk about 6 hours in an 8-hour
20 workday and can sit about 6 hours. She can occasionally climb ramps
and stairs but never ladders, ropes, or scaffolds. She can occasionally
stoop and crawl. She should have only occasional exposure to
extreme heat, humidity, and irritants, such as; fumes, odors, dust,

1 gases, and poorly ventilated areas. She is able to understand,
2 remember, and carryout simple, routine instructions. She should only
3 have occasional interactions with coworkers and brief and superficial
4 interactions with public.

4 Tr. 21.

5 At step four, the ALJ found that Plaintiff cannot perform past relevant work.

6 Tr. 29. At step five, the ALJ found that, considering Plaintiff's age, education,
7 work experience, and RFC, there were other jobs that existed in significant
8 numbers in the national economy that Plaintiff could perform, such as small
9 products assembler I, office helper, and collator operator. Tr. 30-31. The ALJ
10 concluded Plaintiff was not under a disability, as defined in the Social Security
11 Act, from January 18, 2018 through July 30, 2020, the date of the ALJ's decision.
12 Tr. 31.

13 On October 16, 2020, the Appeals Council denied review, Tr. 1-6, making
14 the ALJ's decision the Commissioner's final decision for purposes of judicial
15 review. *See* 42 U.S.C. § 1383(c)(3).

16 ISSUES

17 Plaintiff seeks judicial review of the Commissioner's final decision denying
18 her supplemental security income benefits under Title XVI of the Social Security
19 Act. Plaintiff raises the following issues for this Court's review:
20

- 1 1. Whether the ALJ properly assessed Plaintiff's gastrointestinal and carpal
- 2 tunnel disorders;
- 3 2. Whether the ALJ properly weighed Plaintiff's symptom testimony;
- 4 3. Whether the ALJ properly assessed the medical opinion evidence; and
- 5 4. Whether the ALJ erred in not discussing lay witness testimony.

6 ECF No. 14 at 2; ECF No. 23 at 3.

7 DISCUSSION

8 A. Medically Determinable Impairments

9 Plaintiff contends the ALJ erred by failing to consider Plaintiff's
10 gastrointestinal disorder and erred in determining Plaintiff's bilateral carpal tunnel
11 syndrome was non-severe. ECF No. 14 at 4-8.

12 At step two of the sequential evaluation process, the ALJ considers the
13 severity of the claimant's impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the
14 claimant suffers from "any impairment or combination of impairments which
15 significantly limits [his or her] physical or mental ability to do basic work
16 activities," the analysis proceeds to step three. 20 C.F.R. § 416.920(c). "Thus,
17 applying our normal standard of review to the requirements of step two, [the
18 Court] must determine whether the ALJ had substantial evidence to find that the
19 medical evidence clearly established that [Plaintiff] did not have a medically
20 severe impairment or combination of impairments." *Webb v. Barnhart*, 433 F.3d

1 683, 687 (9th Cir. 2005). An impairment must be established with objective
2 medical evidence such as clinical and laboratory diagnostic techniques, subjective
3 symptoms, a diagnosis, and a medical opinion are insufficient. 20 C.F.R. §
4 416.921. An impairment is considered “not severe if it does not significantly limit
5 your physical or mental ability to do basic work activities.” 20 C.F.R. §
6 416.922(a). Basic work activities include “physical functions such as walking,
7 standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling.” 20
8 C.F.R. § 416.922(b).

9 Step two is “a de minimis screening device [used] to dispose of groundless
10 claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). “It is not meant to
11 identify the impairments that should be taken into account when determining the
12 RFC.” *Buck v. Berryhill*, 869 F.3d 1040, 1048-49 (9th Cir. 2017). A claimant’s
13 RFC should be the same whether or not certain impairments are considered severe.
14 *Id.* at 1049. Thus, where the ALJ decides step two in the claimant’s favor, there is
15 no prejudice in failing to designate a specific impairment as severe where the ALJ
16 considers the impact of such impairment in formulating the RFC. *Id.*

17 At step two, the ALJ found Plaintiff had the following severe impairments:
18 chronic obstructive pulmonary disease, bullous lung disease, status post
19 bullectomy, endometriosis, major depressive disorder, and PTSD. Tr. 18.

1 *1. Gastrointestinal Disorder*

2 Plaintiff asserts the ALJ erred in not considering Plaintiff's gastrointestinal
3 ("GI") disorders at step two and not finding Plaintiff met Listing 5.06B for IBS at
4 step three. ECF No. 14 at 4-7. However, the ALJ accounted for Plaintiff's
5 abdominal pain and symptoms in the RFC, including alternating constipation and
6 diarrhea associated with endometriosis. Tr. 23 (citing Tr. 397, 823, 890, 892, 974,
7 1102). The ALJ also accounted for the various instances where Plaintiff presented
8 with no abdominal pain, nausea, vomiting, diarrhea, melena, or constipation. Tr.
9 24 (citing 368, 388, 503, 569, 597, 734, 757, 867). Where the ALJ decided step
10 two in Plaintiff's favor, the ALJ was required to consider evidence of all
11 impairments in assessing Plaintiff's RFC. *Buck*, 869 F.3d at 1049. The ALJ's
12 discussion at step four includes consideration of Plaintiff's abdominal and
13 digestive complaints in connection with Plaintiff's endometriosis. Therefore,
14 Plaintiff is not prejudiced and any error is harmless.

15 Even if the ALJ were to find a medically determinable impairment of IBS,
16 Plaintiff fails to show Plaintiff's IBS was severe under Listing 5.06B at step three.
17 IBS is "documented by endoscopy, biopsy, appropriate medically acceptable
18 imaging, or operative findings with ... Two of the following despite continuing
19 treatment as prescribed and occurring within the same consecutive 6-month period
20 ... Serum albumin of 3.0 g/dL or less, present on at least two evaluations at least

1 60 days apart ... [and] [i]nvoluntary weight loss of at least 10 percent from
2 baseline, as computed in pounds, kilograms, or BMI, present on at least two
3 evaluations at least 60 days apart.” 20 C.F.R. § Pt. 404, Subpt. P, App. 1, 5.06.

4 Both the albumin and weight loss levels must occur within the same
5 consecutive 6-month period. 20 C.F.R. § Pt. 404, Subpt. P, App. 1, 5.06.

6 Plaintiff’s albumin levels of 3.0 or lower were documented on December 17, 2019
7 and April 26, 2020. Tr. 882, 1151. As to the weight loss, Plaintiff merely assumes
8 a baseline weight of 173 pounds. ECF No. 14 at 6. The ALJ’s and Plaintiff’s
9 citations to Plaintiff’s weight in the record demonstrate that Plaintiff was only 173
10 pounds when she was 30 weeks pregnant. *See* Tr. 18; ECF No. 14. During the
11 relevant timeframe, Plaintiff generally experienced weight gain, not weight loss.
12 *See* Tr. 903 (68 kg = 149.91 pounds on October 14, 2019); Tr. 847 (68.95 kg =
13 152.01 pounds on October 31, 2019 at 14 weeks pregnant); Tr. 1121 (170 pounds
14 on February 13, 2020 at approximately 29 weeks pregnant); Tr. 1100 (173 pounds
15 on February 21, 2020 at 30 weeks pregnant), Tr. 1103 (same). The Court finds
16 Plaintiff fails to demonstrate that her alleged GI impairment met or equaled Listing
17 5.06B. Therefore, the ALJ committed no harmful error at step three by failing to
18 consider the IBS listing.

19 *2. Bilateral Carpal Tunnel Syndrome*

20 Plaintiff assert the ALJ erred in finding Plaintiff’s bilateral carpal tunnel

1 syndrome (“CTS”) non-severe at step two. ECF No. 14 at 7-8. The ALJ found
2 Plaintiff was diagnosed with bilateral CTS in May 2017 and prescribed Medrol,
3 wrist splints, and braces. Tr. 18.

4 In finding the bilateral CTS non-severe, the ALJ first noted that Plaintiff
5 acknowledged that she has yet to undergo a nerve conduction study recommended
6 by her doctor, and that Plaintiff does not plan to have surgery for the CTS because
7 of her fear of surgery. *Id.* The ALJ found that if the bilateral CTS was as severe as
8 alleged, the ALJ would expect Plaintiff would make “every effort to exhaust all
9 treatment options to care for her conditions and make greater efforts to obtain care
10 for her conditions.” *Id.* However, as Plaintiff points out, the record indicates she
11 had not heard from the clinic regarding the referral as of November 2018. Tr. 857.
12 Additionally, the ALJ found in the same paragraph that Plaintiff testified to her
13 fears of surgery were an impediment to pursuing treatment. Tr. 18. Given that
14 Plaintiff provided an adequate reason based on her fear of surgery, this alone was
15 not a clear and convincing reason to find the bilateral CTS non-severe. *Trevizo*,
16 871 F.3d at 679-82; SSR 16-3p, 2017 WL 5180304.

17 Second, the ALJ found no evidence that the condition caused significant
18 limitations in functioning for a continuous period of 12 months within the relevant
19 period. *Id.* In support of this conclusion, the ALJ cites to instances where Plaintiff
20 presented with normal motion, strength, and sensation and that Plaintiff could

1 perform some daily activities. *Id.* However, the record demonstrates Plaintiff also
2 presented with swollen wrists and positive Tinel’s testing, Tr. 437, Plaintiff
3 testified she had difficulty with daily tasks, Tr. 52-53, and state agency sources
4 found Plaintiff was limited to either occasional or frequent handling due to the
5 bilateral CTS. *See* Tr. 89, 106. The ALJ rejected Dr. Hurley’s medical opinion
6 that Plaintiff was limited to light work but occasional bilateral handling based on
7 the ALJ’s own finding that the condition was non-severe. Tr. 89. Although the
8 ALJ relied on some evidence to find the diagnosis as non-severe, significant
9 evidence in the record demonstrates that Plaintiff’s claim is at least debatable.
10 Thus, it has not been clearly established that Plaintiff’s condition is non-severe.
11 *Webb*, 433 F.3d at 686.

12 The Court cannot say that the ALJ’s conclusion that Plaintiff’s bilateral CTS
13 was non-severe was clearly established by medical evidence and that it is a
14 groundless claim at this *de minimis* screening step. Defendant asserts “there can be
15 no harmful error” at step two. ECF No. 23 at 18. However, the ALJ’s error affects
16 the findings at step five and the assessment of Dr. Hurley’s medical opinion, whose
17 opinion the ALJ rejected solely based on finding the impairment as non-severe.
18 Therefore, this case is remanded to readdress Plaintiff’s bilateral CTS at step two
19 and thereafter.

B. Plaintiff's Symptom Testimony

Plaintiff contends the ALJ failed to rely on specific, clear, and convincing reasons to discredit her symptom testimony. ECF No. 14 at 8-16.

An ALJ engages in a two-step analysis to determine whether to discount a claimant's testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2. "First, the ALJ must determine whether there is 'objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged.'" *Molina*, 674 F.3d at 1112 (quoting *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009)). "The claimant is not required to show that [the claimant's] impairment 'could reasonably be expected to cause the severity of the symptom [the claimant] has alleged; [the claimant] need only show that it could reasonably have caused some degree of the symptom.'" *Vasquez*, 572 F.3d at 591 (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007)).

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations omitted). General findings are insufficient; rather, the ALJ must identify what symptom claims are being discounted and what evidence undermines these claims.

1 *Id.* (quoting *Lester*, 81 F.3d at 834); *Thomas*, 278 F.3d at 958 (requiring the ALJ to
2 sufficiently explain why he or she discounted claimant's symptom claims). "The
3 clear and convincing [evidence] standard is the most demanding required in Social
4 Security cases." *Garrison*, 759 F.3d at 1015 (quoting *Moore v. Comm'r of Soc.*
5 *Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

6 Factors to be considered in evaluating the intensity, persistence, and limiting
7 effects of a claimant's symptoms include: (1) daily activities; (2) the location,
8 duration, frequency, and intensity of pain or other symptoms; (3) factors that
9 precipitate and aggravate the symptoms; (4) the type, dosage, effectiveness, and
10 side effects of any medication an individual takes or has taken to alleviate pain or
11 other symptoms; (5) treatment, other than medication, an individual receives or has
12 received for relief of pain or other symptoms; (6) any measures other than
13 treatment an individual uses or has used to relieve pain or other symptoms; and (7)
14 any other factors concerning an individual's functional limitations and restrictions
15 due to pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7-*8; 20
16 C.F.R. § 416.929(c). The ALJ is instructed to "consider all of the evidence in an
17 individual's record," "to determine how symptoms limit ability to perform work-
18 related activities." SSR 16-3p, 2016 WL 1119029, at *2.

19 The ALJ found that Plaintiff's physical and mental impairments could
20 reasonably be expected to cause the alleged symptoms; however, Plaintiff's

1 statements concerning the intensity, persistence, and limiting effects of those
2 symptoms were not entirely consistent with the evidence. Tr. 22. Rather, the ALJ
3 found Plaintiff's statements were not entirely consistent with the medical evidence
4 and other evidence and that such statements were found to affect Plaintiff's ability
5 to work only to the extent they can reasonably be accepted as consistent with the
6 objective medical evidence. *Id.* Because there is no evidence of malingering in
7 this case, the Court must ultimately determine whether the ALJ provided specific,
8 clear, and convincing reasons not to credit Plaintiff's testimony of the limiting
9 effect of her symptoms. *Chaudhry*, 688 F.3d at 672. The Court concludes that the
10 ALJ in part failed to do so.

11 *1. Objective Medical Evidence*

12 An ALJ may not discredit a claimant's symptom testimony and deny
13 benefits solely because the degree of the symptoms alleged is not supported by
14 objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.
15 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991). However, the
16 objective medical evidence is a relevant factor, along with the medical source's
17 information about the claimant's pain or other symptoms, in determining the
18 severity of a claimant's symptoms and their disabling effects. *Rollins*, 261 F.3d at
19 857; 20 C.F.R. § 416.929(c)(2).

1 a. Physical

2 First, the ALJ found Plaintiff's "relatively benign objective findings and
3 usually rather benign presentation appear incompatible with the reported frequency
4 and severity of her symptom and limitations." Tr. 24. First, the ALJ failed to
5 adequately connect the medical record to Plaintiff's symptom testimony. The ALJ
6 cites to a laundry list of "normal" physical exams such as normal, steady gait
7 and/or station and normal cervical spine and/or lumbar spine. *See* Tr. 23-24. The
8 ALJ fails to connect these findings to Plaintiff's impairments (that are primarily
9 related to lung and gynecological disorders). As to these boilerplate findings, the
10 ALJ erred by failing to make a specific finding linking the medical record to
11 Plaintiff's testimony about the intensity or degree of her symptoms. *See Burrell v.*
12 *Colvin*, 775 F.3d 1133, 1139-40 (9th Cir. 2014).

13 As to Plaintiff's pulmonary symptoms, the ALJ found Plaintiff reported
14 improved respiratory status since discharge with no pain or discomfort and that
15 Plaintiff at times denied shortness of breath, did not have episodes of
16 pneumothorax, nor concerns of pneumonia. Tr. 24. However, the ALJ's decision
17 also notes Plaintiff's extensive history regarding her pulmonary condition,
18 including surgery, hospitalizations, collapsed lung, pleural effusion, persistent
19 emphysema, diminished breath sounds, shortness of breath, respiratory distress,
20 pain with respiration, and abdominal tenderness. Tr. 22-24. For example, while

1 the ALJ found imaging in December 2017 did not show an infective process in
2 chest imaging, Tr. 23, the record also demonstrates Plaintiff spent a total of 18
3 days between December 2017 and February 2018 in the hospital with lung
4 symptoms, experienced persistent chest pains and shortness of breath, had imaging
5 demonstrating lung scarring, and Plaintiff continued to seek emergency care for
6 her shortness of breath through 2018 and 2019, and April 2020 imaging indicated
7 right lobe infiltrate. Tr. 285, 287, 310, 323, 376, 430, 468-469, 476, 508, 510-11,
8 524, 543, 575, 594, 632-33, 825-26, 833, 890, 896, 1018, 1066, 1148. It is error
9 for the ALJ to single out a few periods of temporary well-being from a sustained
10 period of impairment and rely on those instances to discredit Plaintiff. *Garrison*,
11 759 F.3d at 1017-18. As a result, the ALJ's finding Plaintiff's pulmonary
12 objective medical evidence as "benign" is not supported by substantial evidence.

13 Second, the ALJ found the statements of Plaintiff and her medical providers
14 show her symptoms were not severe as alleged regarding her pulmonary
15 symptoms. Tr. 24. That Plaintiff reported improved respiratory status at times
16 does not conflict with events in the record that Plaintiff experienced respiratory
17 distress. While Plaintiff reported improved respiratory status in early January
18 2018, she later went to the emergency room for shortness of breath and painful
19 respiration twice before needing inpatient treatment for sepsis and pleural effusion.
20 Tr. 312, 323, 597, 599. The ALJ found in February 2018 she indicated shortness

1 of breath not at baseline, Tr. 24, but that finding is not inconsistent with her
2 testimony that she would get short of breath walking between buildings, taking
3 stairs, and that she uses riding carts in stores. Tr. 51. Finally, ALJ found Plaintiff
4 indicated she was not short of breath between January to April 2020, but that same
5 period show complaints of shortness of breath with activity and does not account
6 for Plaintiff being pregnant during this period, where evidence shows the
7 pregnancy may resolve her lung symptoms connected to endometriosis. Tr. 24,
8 992-93, 985, 1018, 1995, 1022, 1065, 1148. Plaintiff's testimony does not appear
9 inconsistent with the record. The ALJ's finding was not supported by substantial
10 evidence.

11 b. Mental

12 As to the mental conditions, the ALJ found Plaintiff's mental health
13 objective findings insufficiently severe. Tr. 26. In support of this finding, the ALJ
14 found that while there are times Plaintiff presented depressed, anxious, tearful, or
15 restricted affect, Plaintiff generally had normal, appropriate, congruent mood
16 and/or affect, was cooperative, friendly, normal, and exhibited pleasant behavior,
17 was fully alert and oriented, and treatment providers typically observed Plaintiff as
18 being in no acute distress. Tr. 26. It is the ALJ's responsibility to resolve conflicts
19 in the medical evidence. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
20 Plaintiff's cited evidence does not overturn the ALJ's rational interpretation of the

1 remaining evidence in the record. *Burch*, 400 F.3d at 679 (“Where evidence is
2 susceptible to more than one rational interpretation, it is the ALJ’s conclusion that
3 must be upheld.”). The ALJ’s finding is supported by substantial evidence.

4 2. *Failure to Follow Treatment*

5 a. Physical

6 In order to obtain benefits, a claimant generally must follow prescribed
7 treatment if the treatment is expected to restore the claimant’s ability to work. 20
8 C.F.R. § 416.930(a). “A claimant’s subjective symptom testimony may be
9 undermined by an unexplained, or inadequately explained, failure to . . . follow a
10 prescribed course of treatment.” *Trevizo v. Berryhill*, 871 F.3d 664, 679 (9th Cir.
11 2017) (internal quotations and citations omitted). Failure to assert a reason for not
12 following treatment “can cast doubt on the sincerity of the claimant’s [symptom]
13 testimony.” *Id.*

14 First, the ALJ found that Plaintiff was not in full compliance with her
15 treatment plan for the pulmonary symptoms. Tr. 24-25. In November 2018, it was
16 noted that Plaintiff was recommended to undergo a lung surgery for a possible
17 spontaneous pneumothorax on the left lung. *Id.* However, this surgery was
18 recommended and not prescribed. SSR 18-3p. Moreover, the ALJ failed to
19 account for Plaintiff’s testimony that she has a fear of surgery. Thus, this is not a
20

1 clear and convincing reason to discredit Plaintiff's symptom testimony. SSR 18-
2 3p; *Trevizo*, 871 F.3d at 679-82.

3 Second, the ALJ found that Plaintiff's failure to stop smoking cigarettes as
4 recommended by her doctors was another example of noncompliance for treatment
5 of Plaintiff's pulmonary symptoms. Tr. 24. Given the addictive nature of
6 smoking, the Ninth Circuit has disfavored resting a credibility determination upon
7 the failure to quit smoking. *See Bray*, 554 F.3d at 1227. Moreover, SSR 18-3p
8 clarifies that "prescribed treatment does not include lifestyle modifications, such as
9 dieting, exercise, or smoking cessation." 2018 WL 4945641, at *3. Thus, this is
10 not a clear and convincing reason to discredit Plaintiff's symptom testimony.

11 Third, the ALJ found that Plaintiff did not comply with treatment for
12 endometriosis. Tr. 24. In 2019, the treating doctor noted Plaintiff's endometriosis
13 is "pretty significant" but that she had been lost to follow-up historically. *Id.*
14 However, lost to follow-up does not specifically indicate what treatment Plaintiff
15 has failed to follow and the record demonstrates Plaintiff continued to seek care for
16 the endometriosis. Tr. 981, 985, 1014. Additionally, while the ALJ cites
17 Plaintiff's improving symptoms during pregnancy, the ALJ fails to account for this
18 condition generally improving during pregnancy. Tr. 1018. As such, this is not a
19 clear and convincing reason to discredit Plaintiff's symptom testimony.

1 b. Mental

2 The effectiveness of treatment is a relevant factor in determining the severity
3 of a claimant's symptoms. 20 C.F.R. § 416.929(c)(3); *Warre v. Comm'r of Soc.*
4 *Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (determining that conditions
5 effectively controlled with medication are not disabling for purposes of
6 determining eligibility for benefits); *Tommasetti v. Astrue*, 533 F.3d 1035, 1040
7 (9th Cir. 2008) (recognizing that a favorable response to treatment can undermine a
8 claimant's complaints of debilitating pain or other severe limitations). Pursuant to
9 SSR 16-3p at *8-9, the ALJ "will not find an individual's symptoms inconsistent
10 with the evidence in the record [for failure to comply with treatment] without
11 considering possible reasons he or she may not comply with treatment or seek
12 treatment consistent with the degree of his or her complaints." 2016 WL 1119029.

13 The ALJ found Plaintiff had undergone only sporadic mental health
14 treatment. Tr. 26. The ALJ noted Plaintiff had no individual counseling sessions,
15 was on antipsychotic medications for a short period of time, and that she had
16 improved symptoms both on and without medication. *Id.* Plaintiff asserts the ALJ
17 failed to consider her barriers to treatment under SSR 16-3p where she required
18 significant care for her lung condition, lost her home, and developed a fear of
19 doctors following her surgery. ECF No. 14 at 13 (citing Tr. 285, 304, 443, 444).
20 However, Plaintiff's barriers do not appear to be connected to her failure to seek

1 mental health treatment, but rather to treatment for her physical conditions. *See*,
2 *e.g.*, Tr. 47 (avoiding treatment for fear of undergoing complicated procedures);
3 Tr. 304 (fear and anxiety regarding lung condition); Tr. 443 (fear of doctors
4 stemming from lung surgery and mother's death following surgery). Thus, the
5 ALJ did not err where there is no record that such barriers are connected to
6 Plaintiff's sporadic mental health treatment. Moreover, Plaintiff's evidence does
7 not undermine the ALJ's reasonable determination that her treatment was sporadic
8 and conditions improved with medication. The ALJ's finding is supported by
9 substantial evidence.

10 3. *Work History*

11 Evidence of a poor work history that suggests a claimant is not motivated to
12 work is a permissible reason to discredit a claimant's testimony that she is unable
13 to work. *Thomas*, 278 F.3d at 959; 20 C.F.R. § 416.929(c)(3). When considering
14 a claimant's contention that he cannot work because of his impairments, it is
15 appropriate to consider whether the claimant has not worked for reasons unrelated
16 to her alleged disability. *See Tommasetti*, 533 F.3d at 1040; *Bruton v. Massanari*,
17 268 F.3d 824, 828 (9th Cir. 2001) (sufficient reasons for disregarding subjective
18 testimony included stopping work for nonmedical reasons).

19 First, the ALJ found Plaintiff had the ability to work as a waitress and
20 bartender during the relevant period, which was some evidence that she was not as

1 significantly impaired as alleged as she was able to maintain some level of
2 superficial interaction with the public, maintain a schedule, and perform work
3 related tasks. Tr. 27. Where a claimant tries to work for a short period of time and
4 fails because of the impairments should not be a basis to discredit symptom
5 testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9th Cir. 2007). The
6 ALJ's observation that Plaintiff had short stints of work history during a period in
7 which she alleged she was disabled does not provide a clear and convincing reason
8 to discredit her symptom testimony.

9 Second, the ALJ found Plaintiff's poor work history related to factors other
10 than her medical impairments. Tr. 27. The ALJ noted Plaintiff had minimal to no
11 income between 2005 and 2012, minimal to no income between 2015 and 2017,
12 and most jobs since 2012 did not last more than a few months. *Id.* The ALJ
13 concluded this work history suggests Plaintiff's current lack of employment is
14 likely something of longer standing than the current health conditions. *Id.*
15 Evidence of a poor work history that suggests a claimant is not motivated to work
16 is a permissible reason to discredit symptom testimony. *Thomas*, 278 F.3d at 959;
17 SSR 96-7 (factors to consider in evaluating credibility include "prior work record
18 and efforts to work"). In *Thomas*, the claimant not only showed "little propensity
19 to work in her lifetime" but the ALJ also found "no objective medical evidence to
20 support [her] descriptions of her pain and limitations." *Thomas*, 278 F.3d at 959.

1 Plaintiff asserts the ALJ failed to consider her medical history during this period,
2 including multiple laparoscopic surgeries for endometriosis, multiple miscarriages,
3 and multiple hospital admissions. ECF No. 14 at 15. It appears the ALJ made no
4 effort to discern the reasons for Plaintiff's short employment stints prior to the
5 relevant period. *See* Tr. 63 ("I had never quit a job in my life until all this and I
6 just feel really defeated about it like I had to because I panicked. I walked out on a
7 job and I'd never done that before."); Tr. 573 (bartender position ended due to
8 repeated hospital admissions). As a result, this is not a clear and convincing reason
9 to discount Plaintiff's symptoms.

10 Because this case is remanded for other reasons, the Commissioner is
11 instructed to reevaluate Plaintiff's symptom testimony, and incorporate the
12 reported limitations into the RFC or give clear and convincing reasons to reject the
13 symptom claims.

14 **4. Medical Opinion Evidence**

15 Plaintiff challenges the ALJ's evaluation of the medical opinions of L.
16 Hacker, M.D., S. Haney, M.D., P. Metoyer, Ph.D., M. Kuppusamy, M.D., and W.
17 Hurley, M.D. ECF No. 14 at 16-20.

18 As an initial matter, for claims filed on or after March 27, 2017, new
19 regulations apply that change the framework for how an ALJ must evaluate
20 medical opinion evidence. 20 C.F.R. § 416.920c(c); *see also Revisions to Rules*

1 *Regarding the Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed. Reg.
2 5844-01 (Jan. 18, 2017). The ALJ applied the new regulations because Plaintiff
3 filed her Title XVI claim after March 27, 2017. *See* Tr. 15; 27-29.

4 Under the new regulations, the ALJ will no longer “give any specific
5 evidentiary weight ... to any medical opinion(s).” *Revisions to Rules*, 2017 WL
6 168819, 82 Fed. Reg. 5844-01, 5867-68. Instead, an ALJ must consider and
7 evaluate the persuasiveness of all medical opinions or prior administrative medical
8 findings from medical sources. 20 C.F.R. § 416.920c(a)-(b). The factors for
9 evaluating the persuasiveness of medical opinions and prior administrative medical
10 findings include supportability, consistency, relationship with the claimant,
11 specialization, and “other factors that tend to support or contradict a medical
12 opinion or prior administrative medical finding” including but not limited to
13 “evidence showing a medical source has familiarity with the other evidence in the
14 claim or an understanding of our disability program’s policies and evidentiary
15 requirements.” 20 C.F.R. § 416.920c(c)(1)-(5).

16 The ALJ is required to explain how the most important factors,
17 supportability and consistency, were considered. 20 C.F.R. § 416.920c(b)(2).
18 These factors are explained as follows:

- 19 (1) *Supportability*. The more relevant the objective medical evidence and
20 supporting explanations presented by a medical source are to support his
or her medical opinion(s) or prior administrative medical finding(s), the

1 more persuasive the medical opinions or prior administrative medical
2 finding(s) will be.

3 (2) *Consistency*. The more consistent a medical opinion(s) or prior
4 administrative medical finding(s) is with the evidence from other medical
5 sources and nonmedical sources in the claim, the more persuasive the
6 medical opinion(s) or prior administrative medical finding(s) will be.

7 20 C.F.R. § 416.920c(c)(1)-(2).

8 The ALJ may, but is not required to, explain how “the other most persuasive
9 factors in paragraphs (c)(3) through (c)(5)” were considered. 20 C.F.R.

10 § 416.920c(c)(b)(2). However, where two or more medical opinions or prior
11 administrative findings “about the same issue are both equally well-supported ...
12 and consistent with the record ... but are not exactly the same,” the ALJ is required
13 to explain how “the most persuasive factors” were considered. 20 C.F.R.

14 § 416.920c(c)(b)(2).

15 The parties dispute whether Ninth Circuit law that predates that new
16 regulations apply. ECF No. 14 at 16; ECF No. 23 at 10. The Ninth Circuit
17 currently requires the ALJ to provide “clear and convincing” reasons for rejecting
18 the uncontradicted opinion of either a treating or examining physician. *Lester v.*
19 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). When a treating or examining
20 physician’s opinion is contradicted, the Ninth Circuit held the medical opinion can
only “be rejected for specific and legitimate reasons that are supported by
substantial evidence in the record.” *Id.* at 830-31 (internal citation omitted).

1 At this time, the Ninth Circuit has not addressed whether these standards still
2 apply when analyzing medical opinions under the new regulations. Either way, it
3 does not appear that the Court’s analysis in the present case will differ in any
4 respect.

5 *1. Drs. Hacker and Haney*

6 The ALJ found the opinions of Drs. Hacker and Haney most persuasive
7 where they are supported by narrative explanation and based on a longitudinal
8 evaluation of the record. Tr. 28-29. These opinions provided Plaintiff would have
9 “occasional lapses in attention, concentration, attendance, [and] pace[.]” ECF No.
10 14 at 16 (citing Tr. 91, 108). Plaintiff asserts where Plaintiff “occasionally” has
11 lapses in attention, concentration, and pace, she would violate absenteeism
12 tolerances because “occasional” means a condition exists up to 1/3 of the time. *Id.*
13 (citing POMS DI 25001.001). However, as Defendant points out, these opinions
14 found Plaintiff could “complete a usual work day and work week” with limitations
15 provided in the RFC, and Plaintiff points to no evidence that the opinions meant
16 the term “occasional” to have the definition set forth in the vocational context.
17 ECF No. 23 at 11. There is no evidence in the record that the term “occasional”
18 was meant to have a meaning that would conflict with the simultaneous finding
19 that Plaintiff could complete a usual work day and work week. Because the ALJ
20 accepted these opinions and incorporated the findings into the RFC, the ALJ did

1 not err in evaluating these opinions.

2 2. *Dr. Metoyer*

3 The ALJ found Dr. Metoyer's opinion less persuasive than the opinions of
4 Drs. Hacker and Haney. Tr. 28-29. The ALJ found Dr. Metoyer's opinion not
5 supported by and inconsistent with the longitude of the medical record. *Id.* at 29.

6 First, Plaintiff asserts the ALJ erred where the ALJ did not give any reason
7 to discount Dr. Metoyer's limitations for Plaintiff in attendance and completing a
8 normal workday or week. ECF No. 14 at 18. Defendants asserts that an
9 assessment of Plaintiff's persistence was addressed in Drs. Hacker and Haney's
10 opinions, and consequently, Dr. Metoyer's opinion was discounted where the ALJ
11 found the other opinions more persuasive. ECF No. 23 at 13-14. As discussed
12 *supra*, the ALJ found Dr. Haney and Hacker's opinions that Plaintiff could
13 complete usual work day and work week most persuasive. Therefore, the ALJ's
14 reason to discount Dr. Metoyer's opinion in this respect is incorporated in the
15 acceptance of the other medical opinions.

16 Second, Plaintiff asserts the ALJ's reasons for discounting Dr. Metoyer's
17 stress-related limitations are unsustainable. ECF No. 14 at 18-19. The ALJ found
18 Dr. Metoyer's opinion that Plaintiff's ability to deal with the usual stress
19 encountered in the workplace is markedly impaired if it involves persistent
20 activity, complex task, task pressure, and interacting with other individuals not

1 supported by Plaintiff's sporadic course of mental health treatment and benign
2 presentation at medical appointments. Tr. 28-29, 447-48. However, it is unclear
3 how Plaintiff's sporadic mental health treatment and benign presentation at
4 appointments are inconsistent or not supported by a marked limitation in handling
5 stress encountered in the workplace. On remand, the Commissioner must reassess
6 this opinion.

7 *3. Dr. Kuppusamy*

8 The ALJ did not address Dr. Kuppusamy's opinion. Nothing in the new
9 regulations suggests the ALJ can outright ignore a medical opinion. *See* 20 C.F.R.
10 § 416.920(c)(a) ("We will articulate how we considered the medical opinions and
11 prior administrative medical findings in your claim according to paragraph (b) of
12 this section."). Following Plaintiff's surgery in December 2017, Dr. Kuppusamy
13 prohibited Plaintiff from working for 2 weeks and limited her from lifting more
14 than 10 pounds. Tr. 88. Plaintiff asserts this opinion should have been accounted
15 for where Dr. Kuppusamy put no time limitation on Plaintiff's lifting restrictions,
16 which would affect every light work job at step-5. ECF No. 14 at 20. Defendant
17 asserts "there is no indication that Dr. Kuppusamy intended the work limitation to
18 last [longer than twelve months]." ECF No. 23 at 14. Due to this ambiguity, the
19 Court instructs the Commissioner to articulate how this opinion is considered. 20
20 C.F.R. § 416.920(c)(a).

1 4. *Dr. Hurley*

2 The ALJ found Dr. Hurley's opinion unpersuasive solely based on the ALJ's
3 own finding that Plaintiff's bilateral CTS was non-severe. As discussed *supra*, the
4 ALJ's step two determination regarding the bilateral CTS was error. On remand,
5 the Commissioner is instructed to reassess this opinion following a new step two
6 determination.

7 **C. Lay Witness Testimony**

8 Plaintiff asserts the ALJ harmfully erred by not addressing the lay witness
9 testimony of Brandy Brown, Plaintiff's sister. ECF No. 14 at 20-21. Any error in
10 the failure to address lay witness testimony is harmless where the ALJ relied on
11 substantially the same evidence for discrediting the Plaintiff that are legally
12 sufficient. *Molina*, 674 F.3d at 1121-22. Here, the lay witness testimony is
13 substantially similar to Plaintiff's own testimony. *See* Tr. 42-77 (hearing); Tr. 283
14 (letter). However, considering this case is being remanded in part to reevaluate
15 Plaintiff's symptom testimony that the ALJ failed to support with substantial
16 evidence, the Commissioner is instructed to also consider the lay witness
17 testimony.

18 In sum, the Court cannot determine whether the errors in evaluating
19 Plaintiff's medically determinable impairments, Plaintiff's symptoms testimony,
20 and the ALJ's evaluation of the medical opinions were harmless because the

1 evidence evaluated may produce greater limitations than those contained in the
2 RFC formulated by the ALJ. The Court finds it appropriate to remand for the
3 Commissioner to conduct further proceedings. The Court does not find that the
4 record as a whole compels this Court finding that Plaintiff is disabled.

5 **D. CONCLUSION**

6 Having reviewed the record and the ALJ's findings, the Court concludes the
7 ALJ's decision is not supported by substantial evidence and is not free of harmful
8 legal error.

9 **ACCORDINGLY, IT IS HEREBY ORDERED:**

10 1. Plaintiff's Motion for Summary Judgment (ECF No. 14) is **GRANTED**.

11 2. Defendant's Motion for Summary Judgment (ECF No. 23) is **DENIED**.

12 3. This case is **REVERSED** and **REMANDED** pursuant to sentence four
13 of 42 U.S.C. § 405(g) for further proceedings consistent with this Order.

14 The District Court Executive is directed to enter this Order, enter judgment
15 for Plaintiff, furnish copies to counsel, and **CLOSE** the file.

16 DATED December 13, 2021.



Thomas O. Rice
THOMAS O. RICE
United States District Judge